

**MOTION FILED**  
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In the  
**Supreme Court of the United States**  
October Term, 1978

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**No. 78-606**

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THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,  
*Petitioner,*

*v.*

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND ROBERT BATINOVICH, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK, AND WILLIAM SYMONS, JR., THE MEMBERS OF SAID PUBLIC UTILITIES COMMISSION, ET AL.,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF CALIFORNIA**

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF OF DALLAS POWER & LIGHT COM-  
PANY, TEXAS ELECTRIC SERVICE COMPANY  
AND TEXAS POWER & LIGHT COMPANY AS  
AMICI CURIAE IN SUPPORT OF THE PETI-  
TION FOR A WRIT OF CERTIORARI**

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November 8, 1978

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

In accordance with Rule 42 of the Supreme Court of the United States, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company respectfully file this motion for leave to file the accompanying amicus curiae brief. Petitioner has given consent to its filing. The Cities of Los Angeles, San Diego and San Francisco have refused to consent; the other Respondents have failed to reply to requests for consent.

### INTEREST OF AMICI CURIAE

Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company are the operating companies in the Texas Utilities Company System. Together they serve approximately one-third of the people and one-third of the area of the State of Texas with electric energy. They are subject to regulation by municipalities which they serve and by the Public Utility Commission of Texas.

The issues in this case are of nationwide importance. While in no sense does the Public Utilities Commission of the State of California have jurisdiction over these Companies, regulatory procedures and processes of the various jurisdictions, particularly one of the importance of California, are viewed and considered in all jurisdictions. On the other hand, obviously the Internal Revenue Code and Regulations under it, their interpretation, construction and enforcement, are important to all.

The dilemma which the Petitioner faces in this situation is, therefore, of direct concern to these Companies, involving as it does a conflict of interpretation of federal law between the Internal Revenue Service and the California Commission — a conflict which the Supreme Court of California has refused to consider or review.

Petitioner is not in a position to present the facts and circumstances which these Companies face. Petitioner knows its own problems; it cannot adequately present the scope and breadth of the problems which other utility companies will encounter if relief is not granted.

The Public Utility Commission of Texas, though quite conscious of its obligation to represent the interests of rate

payers, has followed regulatory practices in issuing rate orders which recognize the thrust of the accelerated depreciation and investment tax credit provisions of the Internal Revenue Code and permit companies subject to its jurisdiction to receive the benefits of these provisions. Yet, if the decision of the California Commission is allowed to stand, unaffected, the risk is substantial that the Texas Commission and other regulatory bodies will feel impelled, in behalf of rate payers, to follow procedures similar to those adopted in California. The consequences then to other companies will be as dire as those facing Petitioner.

In 1978 Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company had estimated Deferred Federal Income Taxes — Liberalized Depreciation and Investment Tax Credit items totalling nearly \$136,000,000. Similar amounts for 1979 are estimated in excess of \$131,000,000. In addition, the tax credits taken from 1975 through 1977 inclusive (open years for federal income tax limitation purposes) amount to over \$116,000,000. These sums are also in jeopardy as to these Companies.

## CONCLUSION

It is for these reasons that these Companies ask for leave to file their amicus curiae brief in support of the petition for writ of certiorari.

Respectfully submitted,

.....  
Jos. Irion Worsham

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## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE .....	1
ARGUMENT	
I. There is a conflict under the supremacy clause of Article VI of the Constitution between the California decision and the federal position as represented by the Internal Revenue Code, the Regulations, and the Internal Revenue Service Rulings .....	1
II. The California Commission decision and its effect upon Petitioner constitute a violation of the due process clause of the Fourteenth Amendment .....	3
CONCLUSION .....	5

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INTEREST OF AMICI CURIAE

Their interest has been set forth in the foregoing motion for leave to file brief.

ARGUMENT

- I. THERE IS A CONFLICT UNDER THE SUPREMACY CLAUSE OF ARTICLE VI OF THE CONSTITUTION BETWEEN THE CALIFORNIA DECISION AND THE FEDERAL POSITION AS REPRESENTED BY THE INTERNAL REVENUE CODE, THE REGULATIONS, AND THE INTERNAL REVENUE SERVICE RULINGS.

It would be redundant to repeat or paraphrase the statement of Petitioner, which is adopted by reference. It sets forth clearly the conflict which has developed between the California Commission, supported by the Supreme Court of



California,<sup>1</sup> on the one hand, and the position on a federal question taken by the body authorized to administer the federal income tax laws, namely, the Internal Revenue Service, on the other hand.

This is not a situation where a state body has chosen to pass up benefits which it had the option to decline. There is no requirement that a state commission must follow regulatory procedures which would permit a utility to take accelerated depreciation or receive the advantages of investment tax credits. California was free to follow such regulatory procedures as it wished (provided, of course, it considered the impact thereof on the utilities concerned and observed due process standards); but this it did not do. The California Commission has insisted that it has followed the mandates of the Internal Revenue Code and has formulated its own interpretation of the pertinent sections. Such interpretation is squarely in conflict with the rulings of the Internal Revenue Service.

This will not do. The area in which the California Commission attempts to operate—the position it takes—is in the federal domain and in such a question of state-federal conflict, the federal position must prevail, under the supremacy clause of Article VI of the Constitution.

This is a federal controversy of California's making. California has said to Petitioner: "We recognize in this rate-making process that you are entitled to these federal tax

<sup>1</sup> See its decisions in *City and County of San Francisco v. Public Utilities Commission*, 6 Cal.3d 119, 490 P.2d 798 (1971); *City of Los Angeles v. Public Utilities Commission*, 7 Cal.3d 331 (1972); *City of Los Angeles v. Public Utilities Commission*, 15 Cal.3d 680, 542 P.2d 1371 (1975); and its final judgment in this cause (APP.A, p. 1A). The concurring opinion of two Commissioners in the California decision states that: "The entity most responsible for the result of the order as it stands is the Court, which clearly mandated us to achieve a balance between utility and ratepayer which we have finally done."

benefits. We will set your rates on the assumption that you receive them and we are seeing to it that you do so. The federal statute means so and so and that is the basis on which we are proceeding."

But the Internal Revenue Service reads the statute differently — and Petitioner is caught in the middle.

Thus there is here a classic case of state-federal conflict, where the state recognizes the litigant's federal rights but misconstrues them. This Court is the arbiter that must decide the matter. Compare what is said in *St. Louis, Iron Mountain, & Southern Railway Co. v. Taylor*, 210 U.S. 281 (1908) at page 293:

Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union.

## II. THE CALIFORNIA COMMISSION DECISION AND ITS EFFECT UPON PETITIONER CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The California Commission, in issuing its decision, proceeded upon the assumption that Petitioner was entitled

to the benefits of the accelerated depreciation and investment tax provisions of the Internal Revenue Code. It based its rate structures upon this assumption while at the same time inserting provisions which made it impossible for Petitioner to receive these benefits. The Commission gave Petitioner no advance opportunity to apply for a ruling from the IRS and refused to join in Petitioner's subsequent application. It said that the adverse decisions of the Internal Revenue Service when ultimately received added "nothing new" and refused to reconsider. The Supreme Court of California has declined to review the matter.

Under these circumstances there has been an arbitrary and capricious denial of due process. There is a complete absence of the "rudiments of fair play." *West Ohio Gas Co. v. Public Utility Commission of Ohio (No. 1)*, 294 U.S. 63, 71 (1935). Where can Petitioner turn except to this Court? The California Commission will give no relief; the Supreme Court of California will take no action; yet Petitioner is faced with a Commission decision which, unless reviewed and set aside by this Court, will have the gravest financial consequences to Petitioner.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons the writ of certiorari should be granted.

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**CERTIFICATE OF SERVICE**

The undersigned attorney for Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company hereby certifies that three copies of the foregoing Motion for Leave to File Amicus Curiae Brief and Brief were served today upon all counsel of record in this cause by mailing the same to them at their post office addresses with first class postage affixed.

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JOS. IRION WORSHAM

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Service Company and Texas  
Power & Light Company.*

ATTORNEY FOR AMICI  
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